Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. ~~75-~~221

LOCAL 17, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, WILLIE STAMPS, JAMES ATKINSON, DARNEY STANFIELD, AND THE DETROIT EDISON COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROLLAND R. O'HARE
Marston, Sachs, O'Connell, Nunn & Freid, P.C.
Attorneys for Local 17
1000 Farmer Street
Detroit, Michigan 48226
(313) 965-3464

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
962-8745—962-8732

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Local 17, International Brotherhood of Electrical Workers (hereafter Local 17), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in part A of the Appendix.[1] The order amending the opinion appears in part B of the Appendix. The opinion and order of the District Court, reported at 365 F. Supp. 87, appears in part C of the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on March 11, 1975, and, upon consideration of petitions for rehearing suggesting *en banc* consideration, an order rejecting the suggestions for *en banc* consideration and amending the order of the Court was filed on May 16, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether three individuals, none of whom has ever sought to become a member of or be represented by petitioner Local 17 and none of whom has ever expressed a desire to or sought to be hired or transferred into a bargaining unit represented by petitioner Local 17, may properly bring an action on behalf of a class alleged by them to

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[1] A single joint appendix has been filed with Court by Local 223, Utility Workers Union of America, and Local 17. It contains the opinion of the Court of Appeals of March 11, 1975, the order of the Court of Appeals of May 16, 1975, amending the opinion, and the opinion and order of the District Court of October 2, 1973. It is to that appendix that reference is made.

have been illegally discriminated against by petitioner Local 17.

2. Whether the District Court erred in denying petitioner Local 17's motion to dismiss at the conclusion of plaintiffs' case and, ultimately, in finding a violation of Title VII of the Civil Rights Act of 1964 in the absence of any evidence that petitioner Local 17 had committed any unlawful employment practice prohibited by Section 703(c) of the Act, 42 U.S.C. §2000e-2(c).

3. Whether a bona fide seniority system may, in the absence of any evidence that it is racially discriminatory in motivation, implementation or result, be held to violate Title VII of the Civil Rights Act of 1964 or 42 U.S.C. §1981.

4. Whether either the statute or the evidence adduced in this case requires substituting company service for bargaining unit seniority where neither plays any role in inter-departmental transfers and the evidence demonstrates no differential treatment or impact based upon race in respect to intra-departmental advancement in the unit represented by petitioner Local 17.

5. Whether the use of racial quotas and the imposition of racial tests and preferences for employment placement and promotion violate the Constitution and the statutes.

6. Whether the Court of Appeals erred in expanding the affected class to include, solely on the basis of their race, black Edison employees who were never employed in any of the "low opportunity" jobs identified by the District Court and were, consequently, not found by the District Court to have suffered from illicit discrimination in placement or promotion.

7. Whether attorney fees may properly be assessed against petitioner Local 17.

STATEMENT OF THE CASE

The issues at stake in Title VII of the Civil Rights Act of 1964, both in its enactment and its implementation, are central to our survival as a free society. Many of those issues are involved in the instant case.

This case is really two cases joined and tried on a common record. The plaintiffs are three black employees of the Detroit Edison Company in one case and the federal government (in the beginning the Department of Justice and subsequently the Equal Employment Opportunity Commission) in the other. The defendants are Detroit Edison, Local 223 of the Utility Workers Union of America and petitioner Local 17, International Brotherhood of Electrical Workers.

The Detroit Edison Company is a large utility engaged in the business of generating, selling, transmitting and distributing electricity in southeastern Michigan. It employs approximately 10,700 people.

More than half of Edison's employees are unorganized and unrepresented by any labor organization. Petitioner Local 17 represents approximately 800 of the organized employees, all except a handful of whom are employed in the former Overhead Lines Department, which by the time of the hearing had been combined with other departments into a Transmission and Distribution Department. Despite the change on Edison's departmental organization chart, all of the overhead lines employees continue to constitute a single collective bargaining unit. Through collective bargaining, a set of wages, hours and other terms and conditions of employment have been agreed upon between Local 17 and the Company.

Under the agreement, all employees accumulate seniority within the bargaining unit from the day they enter the unit. New employees become part of the overhead lines unit either by transferring into the unit from elsewhere in the Company or upon hire. Petitioner Local 17 plays no part in either process. All decisions about whether or not to hire a particular applicant for employment and all decisions in respect to applications for transfer from other places in the Company into overhead lines are made exclusively by the Company.

The employees in the unit, although unable to affect opportunities for job change or transfer rights outside their own unit, were able, through collective bargaining, to require the Company to give them first crack at the other jobs in their unit as vacancies occur. A vacancy, therefore, must first be posted for bidding in overhead lines throughout the entire Edison service area. Unless the Company can demonstrate that the employee does not possess the required skills, abilities and/or adaptability needed for the job, the senior bidding employee will, under the agreement, be awarded the job. If no bids are received from within the department, the vacancy will then be posted company wide. The Company alone would then decide whether or not to fill the vacancy with an employee transferred from another department. Neither Local 17 nor its seniority system would play any role in that decision.

If a vacancy were filled from within the department, that would, of course, create another vacancy which would be filled by the same procedure. Eventually in this process there would be a vacancy upon which there would be no bid from within the department, at which point the job would be posted throughout the Company.

The District Court found that there were certain jobs in the Company which it called "low opportunity jobs," jobs

which did not lead in predictable sequence to higher paying jobs of a specified pay level. Because of the unitary seniority system and the benefits won by those represented by Local 17 in hard and highly adversary bargaining with the Company, there are no "low opportunity jobs" in the Local 17 unit. All are part of a single unitary seniority system. The top hourly rate in that system is one of the highest —perhaps the highest—in the Company. The District Court, in its opinion and order, identified the lineman position as one of the high opportunity jobs in the Company. Twenty-one of the overhead lines employees represented by petitioner were identified by the Justice Department as black. Of those twenty-one people, eighteen were linemen.

Only one employee testified who had ever sought to be a part of the overhead lines unit or had ever sought to become a member of Local 17. He was called by the Justice Department as its witness. His name is Marvin Brown. He is black. He is a member of Local 17.[2] At the time of hearing, he was a B Crew Leader, the highest classification in the lineman sequence and, therefore, the highest in the Local 17 unit. He testified that he had bid on a company-wide posting into the unit as an apprentice lineman in 1963. He testified supportively about the apprenticeship program, through which he acquired the skills, training and experience to become a journeyman lineman. After the required four years of apprenticeship, Brown became a journeyman and, in the next six years, using the seniority acquired under the Local 17 agreement, moved up to B Crew Leader. He testified about grievances which he had had and which Local 17 had processed. His testimony contained no word

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[2] There is no collective bargaining agreement requirement that any person represented by petitioner become a member of the union. The agreement does not contain a union shop clause, but the lesser and more voluntary "maintenance of membership" clause.

of complaint or criticism of his representation by petitioner.

Brown's testimony is the *only* testimony in the record relating to the operation of Local 17's seniority system and its impact. The private plaintiffs offered *no* testimony regarding Local 17 and petitioner rested at the conclusion of plaintiffs' proofs without calling any witnesses.

All three of the individual plaintiffs testified. Each of them testified that he had never sought membership in Local 17, that he had never sought to transfer into the unit of employees represented by Local 17, and that he had never sought to be represented by Local 17. None of them testified to a single fact, episode or event involving Local 17. *O'Shea* v *Littleton,* 414 U.S. 488, 94 S. Ct. 669, 38 L. Ed 2d 674 (1974).

In fact, no employee or former employee of the Company called by either the government or the private plaintiffs testified to any fact, episode or event involving Local 17 except Marvin Brown.

Despite Brown's testimony, and with no evidence of discriminatory motive or impact, the seniority system was condemned, apparently as a matter of law, by the District Court, which granted wholesale fictional seniority to all members of the affected class who transferred into the bargaining unit (even though neither the contract nor its seniority system deals with such transfers) without any requirement of proof of individual injury or disadvantage.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION AND ORDER BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND RAISES SERIOUS CONSTITUTIONAL AND STATUTORY QUESTIONS BY IMPOSING USE OF RACIAL QUOTAS AND RACIAL PREFERENCES FOR EMPLOYMENT PLACEMENT AND PROMOTION.

The Sixth Circuit's opinion leaves undisturbed those aspects of the District Court's order requiring use of racial quotas and racial preferences in employment placement and promotion.

The District Court reached outside of the affected class to establish hire, transfer and promotion rights in individuals who were and are strangers to the lawsuit and to limit and classify individual applicants and employees in their employment opportunities and rights entirely upon the basis of race.

Paragraph 9, 10, 11, and 12 of the District Court's opinion and order (App., part B, pp. I-320-322) do not even purport to deal with employees or rejected applicants for employment who have been wronged because of their race. Those paragraphs, particularly paragraph 11, establish racial quotas and preferences to comport with the District Court's view of an appropriate racial balance for Edison employees in comparison with the total percentage of persons of the black race in the work force in the Edison service area, particularly the City of Detroit.

Paragraph 11 requires that:

> " . . . [T]he Company shall by recruiting and hiring black applicants or by promoting and transferring

> of black employees fill all future vacancies which are filled from outside the Company or inside the Company in the jobs listed below on the basis of three blacks for every two whites until 25% of the employees in each of these jobs and lines of progression are black: [there follows a list of 27 occupations]".

The purposes for which Section 1981 and Title VII were enacted are mocked when the very evil at which they are aimed is commanded by a putatively remedial order of a federal court.

The statute declares it an unlawful employment practice for an employer "to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . . ; or to limit . . . or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race . . . " (43 U.S.C. §2000e-2(a) (1) and (2)).

The Courts below would require the employer here to commit all of those prohibited acts on a regular and systematic basis, despite the statute and despite the clear statement by this Court of what it is the statute requires.

> "In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is re-

> quired by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications." *Griggs* v *Duke Power Co.*, 401 US 424, 430-431; 91 S. Ct. 849, 853; 28 L. Ed 2d 158, 164 (1971).

Citing precisely the foregoing language, the Sixth Circuit had previously confirmed that the same principle—the principle of eliminating the use of racial classification—is at the core of Section 1981.

> "The purpose for which the Section was enacted—to afford equal opportunities to secure the benefits of American life regardless of race—requires that a court adopt a broad outlook in enforcing Section 1981. Schemes of discrimination, whether blatant or subtle, are forbidden. (Citations omitted.)
>
> "Section 1981 is by is very terms, however, not an affirmative action program. It is an equalizing provision, seeking to ensure that rights do not vary according to race. It does not require that persons be accorded preferential treatment because of their race." *Long* v *Ford Motor,* 496 F2d 500 (6th Cir., 1974.)

The statutes, like the Fifth and Fourteenth Amendments, speak to the rights of persons, of individuals. They eschew —more, make illegal—circumscribing those rights by the use of racial or other impermissible group classifications.

The District Court, now with the sanction by silence of the Court of Appeals, explains its departure from that principle and the extension of its order beyond employees and rejected applicants of Edison in its footnote to para-

graph 9 (App., part B, p. I-320). There it sets a percentage goal of black employment for Edison based upon the percentage of blacks in the area work force. That explanation sets the foundation for the even more rigid racial quotas set out in paragraph 11.

Title VII, in relevant part, says:

> "Nothing contained in this subchapter shall be interpreted to require any employer . . . [or] labor organization . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . in any community, State, section or other area, or in the available work force in any community, State section or other area." 42 U.S.C. §2000e-2(j).

The Constitutional dimension of the use by the Courts below of racial quotas and preferences and the importance of the question to the evolving body of Title VII case law justify the grant of certiorari to review the judgment below.

II.

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE VALIDITY OF DEPARTMENTAL SENIORITY SYSTEMS AS BONA FIDE SENIORITY SYSTEMS UNDER 42 U.S.C. §2000e-2(h) AND PROPER USE OF PREFERENCIAL SENIORITY IN FASHIONING REMEDIES UNDER TITLE VII.

This Court has before it on a grant of certiorari (No. 74-728) the case of *Franks* v *Bowman Transportation Company,* 495 F2d 398 (5th Cir., 1974). Also pending are one or more petitions for certiorari in the case of *Meadows* v. *Ford Motor Company,* 510 F2d 939 (6th Cir., 1975). Both involve aspects of the questions regarding departmental seniority and the proper remedial use of preferential seniority present in this case.

The Courts below, holding that seniority systems which perpetrate past discrimination, even if unintentionally, are not bona fide seniority systems within the meaning of the statute, found the bargaining unit seniority system maintained under petitioner's collective bargaining agreement with Edison to be such a system. Each did so apparently as a matter of law citing no testimonial or other evidentiary basis for the finding.

Seniority, in any form, is a concession which employees wrest from their employer for their own protection.

No law compels the use of seniority by a company or a union as the guarantor of job security or as a factor to be considered in promotion or transfer. No law favors one system of seniority over another. There is nothing, for example, in Title VII which declares company-wide seniority to be superior to or preferred over plant or departmental or classification or some other system of seniority. Title

VII does not support any particular form of seniority and it does not outlaw any either. *Heard* v *Mueller Co.*, 464 F2d 190 (6th Cir., 1972).

What is forbidden are seniority systems which treat affected individuals differently on an illegal basis such as race.

There is no evidentiary basis for the finding that the system involved here does so. Only one black employee of Edison testified to *any* fact relating to Local 17, Marvin Brown. His testimony, offered by the government not by petitioner, is devoid of any hint of discriminatory activity by Local 17, of differential treatment as compared with white employees represented by Local 17, of any misrepresentation of or failure to protect his rights. He came into the bargaining unit by bidding on a company-wide posting in 1963; he spent four years as an apprentice lineman, and he rose in the six years after he became a journeyman to the highest job classification in the unit by virtue of the bargaining unit seniority system.

Having found that the seniority system involved was neutral and would be legal but for the discriminatory hiring, placement and transfer policies of the Company (not petitioner), the Courts below then awarded all black employees seniority from date of hire without any proof of actual disadvantage on injury being required.

The acts of discrimination found by the Court were those of the Company. The Company will, if the findings stand, be paying back pay to those individual employees who can demonstrate actual injury under guidelines adapted by the Sixth Circuit from this Court's opinion in *McDonnell Douglas* v *Green*, 411 US 792, 93 S. Ct. 1817, 36 L. Ed 2d 668 (1973).

Altering a seniority system, unlike the award of back pay, fundamentally affects fellow workers, not the Company. No acts of discrimination were found against petitioner or those workers it represents. Yet the Courts below would alter the seniority system with all of its impact upon those innocent workers without setting any guidelines or requiring any demonstration of actual injury.

In *Meadows,* the Sixth Circuit addressed the seniority question with greater concern, but without resolution. It remanded the matter to the District Court after explicitly disagreeing with Fifth Circuit decisions on the subject.

It did not offer much guidance to the District Court, but noted that "where the burden of retroactive pay falls upon the party which violated the law, the burden of retroactive seniority for determination of layoff would fall directly upon other workers who have themselves had no hand in the wrongdoing found by the District Court."

The prevalence of the devices of retroactive or fictional or constructive seniority in the remedial orders of the courts in Title VII cases, the disagreement between the Fifth and Sixth Circuits as to its proper use, and the importance of the issue involved to affected workers of all races emphasize the need for this Court to consider the question and speak to it.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

ROLLAND R. O'HARE
1000 Farmer Street
Detroit, Michigan 48226

August 6, 1975.